



February 24, 2000

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2000-0674

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 132309.

The City of Austin (the "city") received a request for a listing of all commercial demand customers of Austin Energy, the city's municipally-owned electric utility, that have a monthly power bill in excess of \$2,000. You have submitted a sample of the requested information for our review.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in certain commercial contexts. *See* Open Records Decision No. 593 (1991) (construing predecessor statute). Typically, section 552.104 is applied to protect information submitted to a governmental body in connection with a bid or similar proposal. *Id.* at 2. In such instances, section 552.104 protects the governmental body's interest in obtaining the most optimally favorable contractual terms by denying access to information relating to a bid or proposal prior to the award of a contract. Additionally, however, this office has held that a

¹In reaching the conclusions set forth in this letter ruling, we assume that the sample of information that you submitted is genuinely representative of the requested information as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This letter ruling does not reach, and therefore does not authorize the city to withhold, any requested information that differs substantially from the information submitted to this office for review.

governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of that exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its business interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm in a particular competitive situation. *Id.* at 10. As is generally true whenever section 552.104 is raised, a general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state that pursuant to applicable law, including section 402.001 of the Local Government Code and the city charter, Austin Energy offers its customers a variety of products and services relating to electric service. You also state that the city council approved the sale of these products and services and, in Ordinance No. 980513-C, “specifically found that providing electric products and services at competition-based pricing was necessary to ensure the continued success and value of the City’s electric utility at a time when the electric industry has already become competitive in various areas.” You state that the products and services of Austin Energy relating to the provision of electric service are comparable to those offered by private energy service companies, that Austin Energy’s products and services have been competing with those of private entities for several years, that the energy services market is highly competitive, and that the Austin area is populated by “at least ten large energy service companies and numerous large HVAC and controls contractors and large lighting contractors who perform comprehensive design engineering work and provide installation of systems and maintenance services.” You state that these companies offer products and services similar to those of Austin Energy and that Austin Energy must compete with them on a continuing basis. Based on your representations, we conclude that you have demonstrated that the city has specific competitive interests in the marketplace for electric energy services.

Turning to the second prong of the competitive advantage aspect of section 552.104, we must consider whether the city has adequately demonstrated that release of the requested information would present the prospect of specific harm to Austin Energy’s marketplace interests. You generally assert that Austin Energy would be placed at a competitive disadvantage, resulting in harm to its business interests, should the city be required to disclose the requested list of commercial demand customers. You state that competitors could use the list to their advantage in competing with Austin Energy for customers. More specifically, you note that the requestor, “Electrix,” identifies itself as “an energy management company” that “is marketing a device that protects equipment from voltage transients.” You explain that “[t]his is the same type of surge protection that Austin Energy

offers in accordance with Ordinance 980513-C.”² You assert that the requestor is one of Austin Energy’s competitors in the realm of energy service and that release of the requested information to a competitor would harm Austin Energy’s business interests, as competitors could use the requested customer list to determine which customers to target and which products and services to offer. Based on these further representations, we conclude that the city has demonstrated the presence of the potential for specific harm to its legitimate business interests in a particular competitive situation. Consequently, the city has sufficiently demonstrated that the requested information is excepted from disclosure under section 552.104 of the Government Code and may be withheld.

Because we are able to make a determination under section 552.104, we do not address your claims under sections 552.101 and 552.110. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

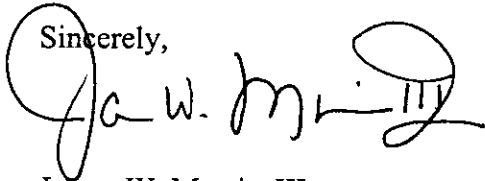
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

²Exhibit “A” to Ordinance 980513-C confirms that the ordinance authorizes Austin Energy to offer “surge protection” that “provides whole building and point-of-use surge protection from voltage spikes” and that is described as being “suitable for residential and commercial establishments.”

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive, flowing style with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/nc

Ref: ID# 132309

Encl. Submitted documents

cc: Mr. Tony Allevato
Electrix
12612 Dove Valley Trail
Austin, Texas 78729-7231
(w/o enclosures)